IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE TWENTY THIRD DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE K.C. BHANU

WRIT PETITION NO : 1810 of 2005

Between:

Sri Sai Srinivasa Constructions, 1-712, Dwarakanagar Colony,
Kadapa rep., by its Managing Partner R.Srinivasa Reddy, s/o R.Rajagopal Reddy,
aged about 38 years, r/o 1-712, Dwaraka Nagar, Kadapa.

..... PETITIONER

AND

1 Government of Andhra Pradesh, Roads and Buildings Department,
Office of the Engineer-in-Chief (R&B) Administration and NABARD Erramanzil,
Hyderabad, rep., by its Chief Engineer.
2 Engineer-in-Chief (R&B) Administration and NABARD Erramanzil, Hyderabad.
3 The Superintending Engineer (R&B Circle), Kadapa.

4. Merit-cum-seniority P.L. Reddy & Co. rep. by its Partner P. Dwarakanth Reddy s/o Laxmee Reddy, 45 years, 103, Dwaraka Nivas, 6-3-662/6, Jaffar Ali Bagh, Somajiguda, Hyderabad.

(R-4 is impleaded as per Court Order dated 23.2.2005 in WPMP 3562/05

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ of mandamus or any other appropriate writ or direction declaring the action of the 3rd respondent in not opening the price bid of the petitioner firm as illegal, arbitrary and violative of Article 19(1)(g) of the Constitution of India and consequently direct the 3rd respondent to consider the tender of the petitioner firm in respect of the works mentioned Annexure II of the affidavit.

Counsel for the Petitioner: MR.D. Prakash Reddy for O.MANOHER REDDY

Counsel for the Respondent Nos 1 to 3: GP FOR ROADS & BUILDINGS

Counsel for the respondent No.4: Mr. C.V. Nagarjuna Reddy

The Court at the admission stage made the following :

The Hon'ble Sri Justice

K.C. Bhanu

W.P. No. 1810 of 2005

O R D E R:

This writ petition is filed seeking to declare the action of the 3rd respondent in not opening the price bid of the petitioner-firm as illegal and arbitrary.

In pursuance of the tender notification issued by the 2nd respondent for various works in the State of Andhra Pradesh, the petitioner-firm has participated in 10 works. According to it, the petitioner-firm satisfies the eligibility criteria as fixed in the tender notification. In pursuance of the tender notification the petitioner-firm has registered on the e-procurement market place and has submitted its tender by on line. The petitioner-firm has uploaded the experience certificates which have been issued by the concerned Executive Engineer and counter signed by the Superintending Engineer to show the quantities of work as well as financial value that have been executed by the petitioner-firm with financial year wise break up and also the certificates required as per the tender conditions. The technical bid was opened on 24.12.2004 and the financial bid was opened on 1.2.2005. The price bid of the petitioner has not been opened on 1.2.2005 whereas the tenders of all the other bidders were opened on that day. Therefore, the petitioner approached the 3rd respondent to know the reasons for not opening the price bid. The staff working in the office of the 3rd respondent did not disclose any reasons. Therefore, the action of the respondents is illegal and

arbitrary. Hence the present writ petition.

The respondents filed counter affidavit stating that the notification criteria has been fixed for opening the price bid as mentioned in the tender inviting notification. The technical bids were opened by the Superintending Engineer on 27.12.2004. The petitioner satisfied all the qualification criteria and qualified in its technical bid and made eligible for opening its price bid and was recommended to the Engineer-in-Chief (R&B) Administration & NABARD for acceptance on 4.1.2005, which was in respect of NIT: 111/04-05. In respect of NIT: 112/04-05 the price bid of the petitioner was opened on 3.1.2005 and the petitioner-firm stood at L2 position. Therefore, the lowest tenderer was recommended. While the technical bids were under process, a petition was received stating that the certificate furnished by the petitioner was false. Based on the petition, the respondents called for the genuineness of the certificates issued by various authorities. As per the information called for, the genuineness of all the experience certificates was confirmed except one certificate i.e. from the Executive Engineer (R&B), Cuddapah. For that, the Executive Engineer has furnished the work wise and year wise breakup both physical and financial for the work executed by the petitioner-firm on Rajampet – Kadiri – Tumkur road duly verifying the connected M.Books and informed that out of the four works covered in the certificates the quantities exhibited against the work at Sl.No.3 & 4 are tallying with minute variation in three items. In respect of works at Sl.No.1 & 2 the total quantities are tallying with the M.Books with minute variation, but they were executed in two different years viz., 2002-03 and 2003-04. To that extent the certificate with the quantities exhibited as having been executed in one year i.e. 2003-04 is not genuine and the office copy of the said certificate is not available in his office records. The said certificate was not originated through proper official formalities and it can be seen beyond doubt that the said experience certificate was issued by the Superintending Engineer (R&B) Circle, Cuddapah himself in his individual capacity on 2.6.2004 and retired from service on 30.6.2004

on superannuation. The Firm has signed all the statements, documents, certificates submitted for each work by it owning responsibility for its correctness/authenticity. The petitioner-firm has furnished a certificate that is not genuine for all the works mentioned above except for NIT No.171/04-05. The firm is disqualified for all the above works as per G.O.Ms.No.94 dated 1.7.2003. The Managing Partner has not approached any staff member of this office. Information relating to examination, classification, evaluation and comparison of tenders and recommendations for the award of a contract shall not be disclosed to tenderers or any other persons not officially concerned with such process. The price bids of the works invited vide NIT Nos.111/04-05 and 112/04-05 were only opened and for the remaining works price bids of the petitioner-firm are not opened as the firm was disqualified. Having waited till the opening of the price bids and after knowing the bids submitted by other contractors, the petitioner filed this writ petition. The petitioner having fraudulently filed certificate showing that he executed the works in one year and playing fraud on the department to grab the work illegally can not make any claim for opening of his price bids. When once the certificate is found not genuine and the action of the petitioner committing fraud on the department is taken into account, the petitioner's tender in all the works cannot be qualified and the department is entitled to disqualify the petitioner in respect of all the works and the petitioner cannot plead ignorance by submitting a fraudulent certificate. Therefore, the respondents pray to dismiss the writ petition.

The petitioner filed a detailed additional affidavit stating that the certificate has been issued by the concerned Executive Engineer and counter signed by the Superintending Engineer and it is the mistake on the part of the concerned officials. Instead of mentioning that the work has been done in two financial years, the then Executive Engineer has issued certificate that the work has been done in the year 2003-04. The said certificate was issued to the petitioner on 2.6.2004 and by that date the petitioner did not

anticipate that these tender notices would be issued at a later date prescribing the conditions. By oversight the petitioner has not noticed the said discrepancy in the certificate nor has used the certificate for getting any work from the Government. Except for the discrepancy with regard to the year in one certificate all other certificates are found true. There appears to be a bona fide mistake on the part of the concerned officials. In respect of two items of work there is no discrepancy with regard to the year of execution and only in respect of two works there is a discrepancy. Even if the break up figures are taken into consideration, still the petitioner-firm satisfies the prescribed conditions in the tender notification. The petitioner-firm does not get any advantage by obtaining the certificate which is alleged to be not genuine. For the mistake of the concerned officials the petitioner cannot be penalised. The petitioner is the lowest tenderer in respect of six items of work and by accepting the tender of the petitioner firm the Government would benefit by more than Rs.50.00 lakhs and thereby lot of public money would be saved. Hence, the petitioner prays to direct the respondents to consider the tender of the petitioner by opening the price bid.

Learned counsel for the petitioner Sri D. Prakash Reddy contended that it is a bona fide mistake on the part of the Executive Engineer who issued the certificate which according to the respondents is not genuine and for the acts and commissions of the respondents the petitioner cannot be penalized. He further contended that the petitioner submitted a certificate issued for four different works relating to two financial years i.e. 2002-03 and 2003-04 and even if the break-up figures are taken into consideration in each financial year, the petitioner satisfies the prescribed conditions in the tender notification. He further contended that it would be a different matter if the petitioner has not executed any works as mentioned in the certificate. On the other hand, the Executive Engineer has furnished the workwise and yearwise breakup both physical and financial for the work executed by the petitioner on Rajampet – Kadiri – Tumkur road duly verifying the connected M.

Books and informed that the works executed by the petitioner tallied with the records of the Department with minute variations. Therefore, he prays to give a direction to the respondents for opening of price bid.

On the other hand, learned Government Pleader vehemently contended that the petitioner has not qualified in the eligibility criteria for opening of price bid. Therefore, its price bid cannot be opened inasmuch as the certificate produced by it is found to be not genuine; that there is no corresponding official office copy of the said certificate available in the office and therefore rightly the price bid of the petitioner has not been opened and therefore he prays to dismiss the writ petition.

The proposed respondent in whose favour two contracts have been issued with letters of intent was brought on record. Learned counsel for the proposed respondent contended that the petitioner was disqualified in terms of G.O.Ms.No.94 dated 1.7.2003 as it made false representation regarding qualification criteria. There is no arbitrary action on the part of the department in disqualifying the petitioner and accepting the tender of the implead petitioner (proposed respondent No.4) and hence the implead petitioner prays to dismiss the writ petition.

The scope of judicial review in contractual matters is very much circumscribed. The award of contract or licence, whether it is by a private party or a public body, is essentially a commercial transaction. It is well settled now that the courts can scrutinize the contracts by the Government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth in *Tata Cellular v. Union of India*. After examining the entire case law, the following principles have been reduced:

"(1) The modern trend points to judicial

restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure".

Bearing the above principles in mind, it has to be seen whether the impugned order suffers from any incurable legal infirmities so as to call for interference by this court.

The 3rd respondent issued a Notice Inviting Tenders ('NIT' for short) for various works in the State of A.P. In all these

tender notifications one of the eligibility criteria for opening of the price bid is that the applicant in its name and style should have during the preceding 5 financial years (i.e. from 1999-2000 to 2003-04) satisfactorily completed as a prime contractor similar works of value not less than the amount as notified in the NIT. The petitioner admittedly satisfied all the eligibility criteria for opening of the price bid except the certificate issued by the competent authority in relation to the works carried out by the petitioner for the financial year 2003-04. The experience certificate issued by the Executive Engineer counter signed by the Superintending Engineer dated 2.6.2004 would go to show that the petitioner has satisfactorily completed the four works in R&B Division, Cuddapah during the year 2003-04. Those four works are (1) Improvements to carriage way in Rajampet – Kadiri – Tumukur road from Km54/0 to 58/0, (2) Improvements to carriage way in Rajampet – Kadiri – Tumukur road from Km 58/0 to 63/0, (3) Improvements to carriage way in Rajampet – Kadiri – Tumukur road from Km 63/0 to 68/0 and (4) Improvements to carriage way in Rajampet – Kadiri – Tumukur road from Km 68/0 to 73/0. According to the petitioner, those works have been carried out by it in one calendar year from January 2003 to September 2003. There cannot be any dispute that the financial year commences from 1st April to 31st March of the succeeding year. Instead of mentioning that the work has been done in two financial years, the then Executive Engineer has issued the certificate that the work has been done in the year 2003-04. The said four works were executed in two financial years admittedly i.e. 2002-03 and 2003-04. According to the learned counsel for the petitioner, it is a bona fide mistake committed by the concerned officials and the petitioner is nothing to do with the same. He further contended that there is no dispute with regard to the quantity of work and the financial value of the work done as mentioned in the certificate and even if the break-up figures are taken for each financial year, the petitioner-firm satisfies the prescribed conditions in the tender notification. This aspect of the case is also not disputed before this court. Even after verification by the respondents, the genuineness of the experience certificates called

for from the concerned officers was received by the 3rd respondent and it was confirmed that all the certificates except the one from Executive Engineer, R&B are genuine. For that certificate, the Executive Engineer, R&B Cuddapah has furnished the work wise and year wise breakup both physical and financial for the work executed by the petitioner-firm on Rajampet – Kadiri – Rumkur road duly verifying the connected M.Books and informed that out of the four works covered in the certificate the quantities exhibited against the work at Sl.Nos. 3 & 4 are tallying with minute variation in three items. In respect of works at Sl.No.1&2 the total quantities are tallying with the M.books with minute variation but they were executed in two different years viz., 2002-03 and 2003-04. According to the respondents, that certificate was not originated through official formalities and the said certificate was issued by the Superintending Engineer who was also in Full-Additional-Charge of the Executive Engineer who retired from service on 30.6.2004 and therefore the petitioner-firm has furnished the certificate that is not genuine for the works mentioned therein.

There cannot be any dispute that the bid conditions should be complied with scrupulously, otherwise there is a scope for discrimination, arbitrariness and favouritism. The Supreme Court in **W.B. State Electricity Board v. Patel Engineering Co.** held that negligent mistake in bid documents cannot be permitted to be corrected even on the basis of equity. It is further held that strict adherence to the instructions to the bidders is essential and cannot be given a go-bye and equity has no role to play in such cases. Therefore, the petitioner being a Class-I contractor in Minor Irrigation Department and did number of works, must be aware of all the tender conditions. One of the conditions for eligibility criteria for opening of the price bid is that one should have completed similar works for the preceding 5 years of the value not less than the amount mentioned in the NIT. Therefore, the petitioner is required to give the nature of work carried out by it in each financial year of the value not less than the amount as specified in the NIT. One such document relating to 2003-

04 is found to be not genuine. Though it is a negligent mistake on the part of the issuing authority, but still a duty is cast upon the petitioner to furnish the documents as required under the NIT. Therefore, the 3rd respondent on verification found that the certificate is not genuine and therefore the price bid of the petitioner was not opened. There is no arbitrary action on the part of the 3rd respondent in not opening the price bid of the petitioner. It is not the case of the petitioner that similarly situated bids of other persons have been opened by the 3rd respondent

Learned counsel for the petitioner placed reliance on a decision of this court in **Subhash Chandran v. Government of A.P.** wherein it is held:

> "In view of what has been stated above, this court feels that, at the time of forwarding the recommendations to the World Bank, since the respondents were in possession of all relevant information as was required in the tender documents with respect to respondent No.4 and they were of the view that the respondent No.4 had the bid capacity and capability, therefore the mistake of not having mentioned a work while submitting his papers would not disentitle respondent No.4 from consideration".

The above decision has no application to the present facts of the case since no information has been sought for by the 3rd respondent herein. In the above said case the pending works were required to be finalized in order to assess the bid capacity of the contractor. Though the 4th respondent therein had not finalized the pending works, still the 4th respondent was within the bid capacity and the 4th respondent was having all the information available with him with regard to the pendency of the work of 4th respondent therein. Therefore, under those circumstances this court held that the

mistake of not having mentioned a work while submitting the papers would not disentitle the 4th respondent therein from consideration. But, here is a converse case where the petitioner included the works which had been done in one financial year in another financial year. Therefore, the decision relied upon by the learned counsel for the petitioner is not applicable to the present facts of the case.

Clause 11(b) of G.O.Ms.No.94 dated 1.7.2003 which is also applicable with regard to streamlining of tender procedures reads “even though the tenderer meets the above qualification criteria, he/she is subject to be disqualified if he/she is found to have misled or made false representation in the forms, statements submitted in proof of the qualification requirements or record of poor performance such as abandoning works, not properly completed in the contract, inordinate delays in completions, litigation history and or financial failures and/or participated in the previous tendering for the same works and had quoted unreasonably high bid prices”.

So, the above condition disqualifies a person who gave or found to have misled or made false representation even with regard to the financial figures. The experience certificate issued by the Executive Engineer counter signed by the Superintending Engineer goes to show as the petitioner did the total value of the work for the year 2003-04 to a tune of above Rs.2.00 Crores. But, as a matter of fact, those four works have been completed in two financial years. The petitioner being Class-I contractor ought to have adhered to the tender conditions strictly in approving the experience certificate for five financial years. No doubt there is no variation in the quantities for the works done by the petitioner but at the same time it should not be a misleading or false information, false information in the sense that the certificate produced by him for the financial year 2003-2004 as he carried out four works when as a matter of fact he did only two works for the financial year 2003-04. In my considered opinion, though the petitioner would not get any advantage by showing two

more works for the financial year 2003-04, but at the same time it is a misleading certificate. It is not for this court to probe into the matter as to the reasons for filing such a certificate by the petitioner.

It is also one of the contentions raised by the learned counsel for the petitioner that the petitioner's tender is the lowest in respect of six items of work and by accepting the tender of the petitioner-firm the Government would benefit by more than Rs.50.00 lakhs and thereby lot of public money would be saved. After opening of the price bids only the petitioner filed the writ petition. Difference of price offered by two tenderers may or may not be decisive in deciding whether public interest is involved in intervening in such a commercial transaction as held in **Raunaq International Ltd. v. I.V.R. Construction Limited**. It is further held in the said decision that unless the court is satisfied that there is a substantial amount of public interest or the transaction entered into is mala fide, the court should not intervene under Article 226 in disputes between the two rival tenderers. No mala fides are attributed to the 3rd respondent in this case in not opening the price bids. Though the Government would benefit more than Rs.50.00 lakhs by accepting the tender of the petitioner, but at the same time the petitioner, whether intentionally or unintentionally, misled or made false statement by producing a certificate stating that four works have been carried out in one financial year. For producing such a certificate, the 3rd respondent has rightly not opened the price bid.

Admittedly the technical bids of all the participants have been opened by the 3rd respondent on 27.12.2004. The technical bids of the petitioner-firm were also evaluated and as the certificate produced by the petitioner-firm was found to be not genuine, the 3rd respondent disqualified the petitioner-firm and its price bid was ignored. After opening of the price bid the petitioner has approached this court on 4.2.2005. Therefore, the action of the 3rd respondent in not opening the price bid of the petitioner-firm cannot be said to be arbitrary or malice and the same cannot be said to be contrary to NIT.

For the aforesaid reasons, the writ petition is devoid of merit and it is accordingly dismissed.

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K.C. Bhanu, J.

Date: --02—2005.

MVB.

..... REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1 The Chief Engineer, Government of Andhra Pradesh, Roads and Buildings Department, Office of the Engineer-in-Chief (R&B) Administration and NABARD Erramanzil, Hyderabad, .
2 Engineer-in-Chief (R&B) Administration and NABARD Erramanzil, Hyderabad.
3 The Superintending Engineer (R&B Circle), Kadapa.

4. Two C.Cs. to the G.P. for Roads & Buildings, High Court of A.P., Hyderabad (OUT).

5. 2 CD copies